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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/827,803	04/06/2001	Efrain Torres	HILB / 720	6869

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WOOD, HERRON & EVANS, LLP  
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CINCINNATI, OH 45202

EXAMINER
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NGUYEN, CUONG H

ART UNIT	PAPER NUMBER
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3661

DATE MAILED: 10/07/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

## Application No.

09/827,803

## Applicant(s)

TORRES ET AL.

## Examiner

CUONG H. NGUYEN

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*[Handwritten signature]*

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 1 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 19 May 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-69 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☐ Claim(s) \_\_\_\_\_ is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☒ Claim(s) 1-69 are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 06 April 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

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**Response**

1. On 5/19/2004, Applicants elected Group I (claims 1-29, and 55-66) with traverse; please consider the following requirement on multiplicity of claims to make an appropriate election (See Federal Register: October 5, 1998, Volume 63, Number 192, e.g., Page 53507).

**Restriction/Election**

2. Pending claim would be rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicants regard as the invention.

Taken as a whole, the pending claims recite an undue multiplicity of claims (a method and a software product merely to perform steps of that method) by virtue of the unreasonable number of claims presented would tend to obfuscate, confuse, and becloud the claimed invention. Because the examiner strongly believes that twenty-five (25) claims or less are sufficient to properly define applicants' invention, applicants are required to select certain claims, not to exceed twenty-five for examination on the merits, See M.P.E.P. 2173.05(n). To be complete, the non-selected claims must be cancelled or why the above rejection would be in error (for a recent statistic of

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number of claims in a single patent application, see  
Federal Register: October 5, 1998, Volume 63, Number 192,  
Page 53507).

Applicants are being afforded the courtesy of a  
written response due to broad and multiplicity  
characteristics of the claims.

3. Applicants are reminded that upon the cancellation of  
claims to a non-elected invention, the inventorship must be  
amended in compliance with 37 CFR 1.48(b) if one or more of  
the currently named inventors is no longer an inventor of  
at least one claim remaining in the application. Any  
amendment of inventorship must be accompanied by a request  
under 37 CFR 1.48(b) and by the fee required under 37 CFR  
1.17(i).

#### 4. Appendix:

The number of independent claims is both unreasonable  
and rare; an unreasonable number of claims, that is,  
unreasonable in view of the nature and scope of applicants'  
invention and the state of the art, may afford a basis for  
a rejection on the ground of multiplicity. A rejection on  
this ground should include all the claims in the case  
inasmuch as it relates to confusion of the issue. (See  
Appendix 1).

#### **APPENDIX 1**

2173.05(n) Multiplicity [R - 3]

37 CFR 1.75 Claim(s).

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(a) The specification must conclude with a claim particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention or discovery.

(b) More than one claim may be presented provided they differ substantially from each other and are not unduly multiplied.

(c) One or more claims may be presented in dependent form, referring back to and further limiting another claim or claims in the same application. Any dependent claim which refers to more than one other claim ("multiple dependent claim") shall refer to such other claims in the alternative only. A multiple dependent claim shall not serve as a basis for any other multiple dependent claim. For fee calculation purposes under 1.16, a multiple dependent claim will be considered to be that number of claims to which direct reference is made therein. For fee calculation purposes, also, any claim depending from a multiple dependent claim will be considered to be that number of claims to which direct reference is made in that multiple dependent claim. In addition to the other filing fees, any original application which is filed with, or is amended to include, multiple dependent claims must have paid the fee set forth in 1.16 d. Claims in dependent form shall be construed to include all the limitations of the claim incorporated by reference into the dependent claim. A multiple dependent claim shall be construed to incorporate by reference all the limitations of each of the particular claims in relation to which it is being considered.

(d)(1) The claim or claims must conform to the invention as set forth in the remainder of the sp (2) See 1.141 to 1.146 as to claiming different inventions in one application.

(e) Where the nature of the case admits, as in the case of an improvement, any independent claim should contain in the following order, (1) a preamble comprising a general description of all elements or steps of the claimed combination which are conventional or known, (2) a phrase such as "wherein the improvement comprises," and (3) those elements, steps, and/or relationships which constitute that portion of the claimed combination which the applicant regards as the new or improved portion.

(f) If there are several claims, they shall be numbered consecutively in Arabic numerals.

>(g) The least restrictive claim should be presented as claim number 1, and all dependent claims should be grouped together with the claim or claims to which they refer to the extent practicable.

(h) The claim or claims must commence on a separate sheet.

(i) Where a claim sets forth a plurality of elements or steps, each element or step of the claim should be separated by a line indentation.

An unreasonable number of claims, that is, unreasonable in view of the nature and scope of applicant's invention and the state of the art, may afford a basis for a rejection on the ground of multiplicity. A rejection on this ground should include all the claims in the case inasmuch as it relates to confusion of the issue.

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To avoid the possibility that an application which has been rejected on the ground of undue multiplicity of claims may be appealed to the Board of Patent Appeals and Interferences prior to an examination on the merits of at least some of the claims presented, the examiner should, at the time of making the rejection on the ground of multiplicity of claims, specify the number of claims which in his or her judgment is sufficient to properly define applicant's invention and require the applicant to select certain claims, not to exceed the number specified, for examination on the merits. The examiner should be reasonable in setting the number to afford the applicant some latitude in claiming the invention specification and the terms and phrases used in the claims must find clear support or antecedent basis in the description so that the meaning of the terms may be ascertained by reference to the description (See 1.58(a)).

## Appendix 2

Federal Register: October 5, 1998 (Volume 63, Number 192)) [Proposed Rules]  
[Page 53497-53530]  
From the Federal Register Online via GPO Access [[waiss.access.gpo.gov](http://www.access.gpo.gov)]  
[DOCID:fr05oc98-30]  
[[Page 53497]]

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Part II  
Department of Commerce  
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Patent and Trademark Office  
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37 CFR Part 1  
Changes To Implement the Patent Business Goals; Proposed Rule [[Page 53498]]  
DEPARTMENT OF COMMERCE Patent and Trademark Office  
37 CFR Part 1  
[Docket No.: 980826226-8226-01] RIN 0651-AA98  
Changes To Implement the Patent Business Goals  
AGENCY: Patent and Trademark Office, Commerce.

ACTION: Advance notice of proposed rulemaking.

## II. Specific Patent Business Goals

The PTO has established five specific Patent Business Goals, which have been adopted as part of the Fiscal Year 1999 Corporate Plan Submission of the President. The five Patent Business Goals are:

Goal 1: Reduce PTO processing time (cycle time) to twelve months or less for all inventions.

Goal 2: Establish fully-supported and integrated Industry Sectors.

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Goal 3: Receive applications and publish patents electronically.

Goal 4: Exceed our customers' quality expectations, through the competencies and empowerment of our employees.

Goal 5: Align fees commensurate with resource utilization and customer efficiency.

#### A. Introduction

The topics on which the PTO particularly desires public input at this rulemaking stage are:

- (1) Simplifying requests for small entity status (37 CFR 1.27);
- (2) Requiring separate surcharges and supplying filing receipts (37 CFR 1.53);
- (3) Permitting delayed submission of an oath or declaration, and changing time period for submission of the basic filing fee and English translation (37 CFR 1.52, 1.53);
- (4) Limiting the number of claims in an application (37 CFR 1.75)

#### 4. Limiting the number of claims in an application (37 CFR 1.75)

...

Summary: The PTO is considering a change to 37 CFR 1.75 to limit the number of total and independent claims that will be examined (at one time) in an application.

Specific Change Being Considered: The PTO is considering a change to the rules of practice to: (1) limit the number of total claims that will be examined (at one time) in an application to forty; and (2) limit the number of independent claims that will be examined (at one time) in an application to six. In the event that an applicant presented more than forty total claims or six independent claims for examination at one time, the PTO would withdraw the excess claims from consideration, and require the applicant to cancel the excess claims. This change would apply to all non-reissue utility applications filed on or after the effective date of the rule change, to all reissue utility applications in which the application for the original patent was subject to this change, and to national applications filed under 35 U.S.C. 111(a), as well as national applications that resulted from a PCT international application.

Discussion: Applications containing an excessive number of claims present a specific and significant obstacle to the PTO's meeting its business goals of reducing PTO processing time to twelve months or less for all inventions. While the applications that contain an excessive number of claims are relatively few in percentage (less than 5%), these applications impose a severe burden on PTO clerical and examining resources, as they are extremely difficult to properly process and examine. The extra time and effort spent on these applications has a negative ripple effect, resulting in delays in the processing and examination of all applications, which, in turn, results in an increase in pendency for all applications. In view of the patent term provisions of 35 U.S.C. 154, as amended by the Uruguay Round Agreements Act (URAA), Pub. L. 103-465, 108

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Stat. 4809 (1994), PTO processing time and pendency are concerns to the PTO and all applicants. Thus, the PTO considers it inappropriate to continue to permit the proclivity of a relatively low number of applicants (less than 5%) for excessive claim presentation to result in delays in examination and unnecessary pendency for the vast majority of applicants.

Approximately 215,000 utility applications were filed in the PTO in Fiscal Year 1997. PTO computer records indicate that the approximate number and percentage of applications filed in Fiscal Year 1997 containing the following ranges of independent and total claims breaks down as follows:

[[Page 53507]]

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Applications filed FY 97 with: Number 1997 filings % FY  
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Over 50 independent claims.....	11	0.005
Between 41 and 50 independent claims	23	0.011
Between 31 and 40 independent claims..	77	0.358
Between 21 and 30 independent claims.	275	0.128
Between 16 and 20 independent claims.	.536	0.249
Between 11 and 15 independent claims.	1,887	0.878
Between 7 and 10 independent claims...	7,024	3.267
Between 4 and 6 independent claims....	27,147	12.627
Over 6 independent claims.....	9,833	4.896
Over 500 total claims.....	5	0.002
Between 201 and 500 total claims.....	88	0.041
Between 101 and 200 total claims.....	652	0.303
Between 61 and 100 total claims.....	2,514	1.169
Between 51 and 60 total claims.....	2,143	0.997
Between 41 and 50 total claims.....	4,056	1.887
Between 31 and 40 total claims.....	8,631	4.014
Between 21 and 30 total claims.....	23,323	10.848
Over 40 total claims.....	9,458	4.399

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These numbers indicate that over 95% of all applications filed in Fiscal Year 1997 contained fewer than forty total claims and over 95% of all applications filed in Fiscal Year 1997 contained fewer than six independent claims. Thus, the rule change under consideration should not prevent the overwhelming majority of applicants from presenting the desired number of total and independent claims for examination. In addition, the rule change under consideration will benefit the overwhelming majority of applicants, since it will stop a relatively small number of applicants from occupying an inordinate amount of PTO resources.



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While the problem with applications containing an excessive number of claims is now reaching a critical stage, this problem has long confronted the PTO. In 1926, Commissioner Robertson remarked that applications containing an excessive number of claims constitute the greatest abuse confronting the PTO (then the Patent Office). See *Ex parte McCullough*, 1927 Dec. Comm'r Pat. 12, 13 (1926). The issuance of patents containing an excessive number of claims has also long been considered an abuse of the courts and the public. See *Carlton v. Bokee*, 84 U.S. (17 Wall) 463, 471-72 (1873) (needless multiplication of nebulous claims deemed calculated to deceive and mislead the public); *Wahpeton Canvas Co. v. Frontier, Inc.*, 870 F.2d 1546, 1551 n.6, 10 USPQ2d 1201, 1206 n.6 (Fed. Cir. 1989) (presentation of the infringement issue on an overgrown claims jungle to a jury and judge at trial is an unprofessional exercise in obfuscation). Put simply, applications (and the resulting patents) that contain an excessive number of claims are a problem that has long confronted the PTO, the courts, and the public.

Historically, this problem (applications containing an excessive number of claims) has been dealt with on a case-by-case basis, in that the presentation of an unreasonable number of claims in an application may result in an undue multiplicity rejection. See MPEP 2173.05(n). The CCPA has affirmed rejections based upon undue multiplicity when the degree of repetition and multiplicity" in the claims "beclouds definition in a maze of confusion." See *In re Chandler*, 319 F.2d 211, 225, 138 USPQ 138, 148 (CCPA 1963); see also *In re Chandler*, 254 F.2d 396, 117 USPQ 361 (CCPA 1958). In subsequent decisions, however, the CCPA has declined to hold that the presentation of any particular number of claims is so excessive as to confuse or obscure the inventions defined by the claims. See *In re Wakefield*, 422 F.2d 897, 164 USPQ 636 (CCPA 1970); and *In re Flint*, 411 F.2d 1353, 162 USPQ 228 (CCPA 1969). These subsequent decisions have severely cut back on the use of rejections based upon undue multiplicity. See *Ex parte Sheldon*, 172 USPQ 319 (BPAI 1972).

After the 1970s, the PTO balanced the difficulty of making and defending undue multiplicity rejections with likelihood of its success on appeal against the burden of just examining applications containing an excessive number of claims, and generally chose to simply suffer the burden of examining such applications. Recently, however, this problem (applications containing an excessive number of claims) has been exacerbated by the advent of word-processing equipment, which significantly reduces the skill and effort required to draft and present a seemingly endless number of claims in an application. The change during the last twenty years to the index of claims in the application file wrapper illustrates this point: the file wrapper for the 1979 series (the 06 series) applications had an index for fifty claims; the file wrapper for the 1987 series (the 07 series) and 1993 series (the 08 series) applications had an index for 100 claims; the file wrapper for the 1998 series (the 09 series) now has an index for 150 claims.

For these reasons, it is now time for the PTO to act to limit the use of excessive numbers of claims in an application. The PTO is specifically proposing

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to deal with this problem now on a systemic basis by limiting, via rulemaking, the number of claims that will be examined in an application. This proposal supports the PTO business goals of reducing PTO processing time to twelve months or less for all inventions, and aligning fees to be commensurate with resource utilization and customer efficiency.

A rule limiting the number of claims in an application is within the PTO's rulemaking authority under 35 U.S.C. 6(a) if it "is within the [PTO's] statutory authority and is reasonably related to the purposes of the enabling legislation \*\*\* and does no violence to due process." See *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 606, 225 USPQ 543, 252 (Fed. Cir. 1985) (citations omitted).

35 U.S.C. 41(a)(1)(B) provides that an applicant must pay an additional fee for the presentation of each independent claim in excess of three and each claim in excess of twenty. This implies that an applicant is entitled to present more than three independent claims, and more than twenty total claims, but it does not imply that the PTO may place no limit on the number of claims that an applicant may present. See *Ex parte Jenkins*, 1930 Dec. Comm'r Pat. 8 (1930) (that the patent statute now requires a fee for additional claims does not mean that there is no end to the number of claims that the applicant may present). In addition, PCT Rule 6.1 specifically states that "[t]he number of claims shall be reasonable in consideration of the nature of the invention claimed." Placing a reasonable limit (e.g., no more than six independent claims and no more than forty total claims) will: (1) permit the PTO to more equitably distribute its resources among the vast number of applications that must be examined each year (35 U.S.C. 131 and 132); and (2) assist the PTO, public, and the courts in ascertaining what it is that the applicant considers to be the invention (35 U.S.C. 112, para. 2).

35 U.S.C. 131 and 132 require the PTO to examine the more than two hundred thousand applications that are filed each year, and 35 U.S.C. 282 provides that each claim of the patents resulting from these applications is presumed to be valid, each independently of the others. It is the PTO's goal to issue patents containing claims whose validity is based not solely upon presumptions resulting from the patent statute and PTO regulations, but based upon the actuality that each claim of the applications resulting in such issued patents has been subjected to an effective, high-quality examination. In view of the ever increasing number of applications filed each year, the PTO has determined that it must place some limits on the number of total claims and independent claims that an applicant may present in a single application to ensure that the PTO continues to issue patents that contain only claims that have been subjected to such effective, high-quality examination.

Such a rule would bear a reasonable relationship to the provisions of 35 U.S.C. 112, para. 2, that an application conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention. While 35 U.S.C. 112, para. 2, provides that the claims describe "the subject matter which the applicant regards as his invention" (emphasis added), it does not preclude the PTO from limiting the

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claims in regard to matters of form. See *Fressola v. Manbeck*, 36 USPQ2d 1211, 1214 (D.D.C. 1995).

As discussed above, the historical basis for undue multiplicity rejections was that the presentation of an excessive number of claims in an application generally operated to confuse or obscure the invention. This problem existed in the nineteenth century (*Carlton*) and remains a problem today (*Wahpeton Canvas*). Limiting the number of claims in an application will discourage applicants from presenting claims that confuse or obscure the point of the invention. Thus, such a rule would advance the statutory goal of 35 U.S.C. 112, para. 2, that an application or patent conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention. See *Fressola*, 36 USPQ2d at 1214. Any change to 37 CFR 1.75 to limit the number of claims in an application must also take into account the situation in which a single claim is, in actuality, a plurality of claims (e.g., multiple dependent claims, Markush claims (see *Ex parte Markush*, 1925 Dec. Comm'r Pat. 126 (1924)), claims referencing plural sequence listings (see MPEP 2422.04), and claims setting forth (non-Markush) alternative limitations (see MPEP 2173.05(h)). A multiple dependent claim will be counted as the number of claims to which direct reference is made in that multiple dependent claim. See 37 CFR 1.75(c). Limits (for a claim to be counted as a single claim) would also be placed on: (1) the number of species that may be embraced within a Markush claim; (2) the number of sequence listings that may be referenced in a single claim; and (3) the number of alternative limitations that may be included in a claim.

The PTO is considering only a limit on the number of claims that will be examined in a single application, not a limit of the number of claims that may be presented for the inventions disclosed in an application. Forty total claims with six independent claims should be sufficient for an applicant to obtain adequate coverage for an invention. An applicant who is unable to limit him or herself to forty total or six independent claims in a single application may effectively obtain examination of additional claims in another application. As the PTO would expend more of its scarce processing and examination resources on ten applications containing forty claims each than the PTO would expend on a single application containing four hundred claims, the PTO's objective is not to have applicants to spread-out excessive numbers of claims among multiple applications to increase fee revenue. The PTO's objective is to encourage the few applicants who currently present an excessive number of claims in an application to place reasonable limits on the number of claims presented for examination.

Nevertheless, an applicant would effectively be permitted to present any number of claims for examination by filing any number of continuing applications, each application presenting no more than forty total or six independent claims for examination. Thus, the PTO's refusal to examine more than forty total or six independent claims in a single application is not tantamount to a rejection of such claims, as the excess claims would be examined if presented in another

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application. See *In re Fressola*, 22 USPQ2d 1828, 1831-32 (Comm'r Pat. 1992) (an objection or other requirement is not a rejection if it does not interfere with applicant's substantive right of expression).

In the extraordinary situation in which it would be more beneficial to the PTO, the public, and the applicant to permit the applicant to maintain more than forty claims in a single application (e.g., numerous species claims depending from a single allowable genus claim), the applicant may file a petition under 37 CFR 1.183 requesting a waiver of this limitation. Such petitions would be decided on a case-by-case basis, and would be subject to such other requirements as may be imposed. See 37 CFR 1.183.

Conclusion:

This is a new service that the PTO is considering and would involve significant start-up costs. Therefore, absent positive feedback on the matter, the PTO does not intend to implement this new service.

Dated: September 28, 1998.

Bruce A. Lehman,  
Assistant Secretary of Commerce and Commissioner of Patents and  
Trademarks.

[FR Doc. 98-26429 Filed 10-2-98; 8:45 am]

BILLING CODE 3510-16-P

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to CUONG H. NGUYEN whose number is 703-305-4553. The examiner can normally be reached on 7am-3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's acting supervisor, JEFFREY A. SMITH can be reached on 703-308-3588. The fax phone number for the organization where this application or proceeding is assigned is 703-305-7687.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-746-5572.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Please provide support, with page and line numbers, for any amended or new claim in an effort to help advance prosecution; otherwise any new claim language that is introduced in an amended or new claim may be considered as new matter, especially if the Application is a Jumbo Application.

*Cuong H. Nguyen*

*CHN*  
CUONG H. NGUYEN  
Primary Examiner  
Art Unit 3625